86-213

Supreme Court, U.S.
FILED
AUG 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIE FIELDS, MARY LEE FIELDS - **Appellants**

versus

BERRY LEWIS, RUTH LEWIS - - - **Appellees**

On Appeal from the Supreme Court of Kentucky

JURISDICTIONAL STATEMENT
CIVIL CASE

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42pp.

QUESTIONS PRESENTED

I. Did the Trial Court Err as a Matter of Law and Thus Deprive Appellants of Their Property in Violation of the Appellants Due Process Rights Under the Fourteenth Amendment to the United States Constitution When the Kentucky Court Failed to Rule According to Long Established Rules of Construction for Locating Boundaries?

II. Was the Trial Court's Action in Locating the Boundary According to a Surveyor Who Was Not Licensed so Arbitrary and Capricious as to Deny Appellant's Due Process of Law?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. _____

WILLIE FIELDS, MARY LEE FIELDS - - *Appellants*

v.

BERRY LEWIS, RUTH LEWIS - - - *Appellees*

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

JURISDICTIONAL STATEMENT
CIVIL CASE

OPINIONS BELOW

The opinion of the Kentucky Supreme Court entered May 13, 1986, the opinion of the Kentucky Court of Appeals dated March 28, 1986, and the opinion of the Leslie Circuit Court dated November 7, 1984, are set out in the Appendix hereto.

JURISDICTION

This action, which involves a certain property and boundary dispute wherein Plaintiff Appellant sought to quiet title to property derived from a common source draws in question the validity of the decision of the Kentucky Supreme Court affirming the lower Courts actions on the grounds that the Court's action amounted

to a violation of appellant's due process rights. Such deprivation of property rights under color of state action is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. The decision was not made in accordance with the facts and existing Kentucky law on locating boundaries and thus denies the appellant his true right of possession, of due process of law, and improperly accords the ownership to a relatively large tract of property to the appellee based on an illegal survey.

On November 7, 1984, the Circuit Court of Leslie County, Kentucky, held for the appellee ruling that the appellee be adjudged the owner as per his "surveyor's" location described in the evidence in this case. On March 28, 1986, the Kentucky Court of Appeals affirmed, and appellant was denied discretionary review by subsequent decision of the Supreme Court of Kentucky on May 13, 1986. Notice of appeal to this Court was timely filed on July 24, 1986.

The jurisdiction of the United States Supreme Court to review this decision of the Supreme Court of Kentucky on appeal is conferred by 28 U.S.C. ¶1257(1). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Seminole Fruit and Land Co.* v. *Pyles,* D.C. Fla. 1926, 13 F. 2d 878, a boundary dispute, Irvin v. Doud, Ind. 1961, 81 S. Ct. 1639, 366 U. S. 717, 6 L. Ed. 2d 751; *Abbott* v. *Tacoma Bank of Commerce,* Wash. 1899, 20 S. Ct. 153, 175 U. S. 409, 44 L. Ed. 217; and *People of State of New York ex rel New York and*

Queens Gas Co. v. *McCall, N. Y.*, 1917, 38 S. Ct. 122, 245 U. S. 345, 62 L. Ed. 337.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is a property boundary dispute between the appellants, Willie Fields, his wife, Mary Lee Fields, and Clara Fee Lewis, and the appellee, Berry Lewis. The property in question is located in a remote, mountainous area of Leslie County, Kentucky. The original tract was divided and now consists of three separate tracts conveyed from Clara Fee Lewis to (1) Mabel Snyder; (2) Berry Lewis; and (3) Willie Fields and Mary Lee Fields.

The Court judgment quiets title to a 2 acre tract wherein Mr. Berry Lewis lives that was never even in dispute except as it related to the other tract.

This is a boundary dispute on a tract of land located on Greasy Creek in Leslie County, Kentucky. The

original grantor, Clara Lewis, made three conveyances from one parent tract. Mrs. Clara Lewis first deeded a tract to Mable Snyder in 1947 and this is recorded in Deed Book 49, page 429, Leslie County Court Clerk's Office and a copy of that deed is also in the appendix. The third out conveyance, conveying the remainder of the entire property, was made to Willie Fields and wife, Mary Lee Fields, from Clara Fee Lewis and recorded in Deed Book 81, page 32. All of these deeds are in the Leslie County Court Clerk's Office in Hyden, Kentucky and copies are attached hereto in the Appendix.

On March 6, 1953 Mable Snyder conveyed her tract derived from Clara Fee Lewis to Ruth Lewis, wife of Berry Lewis, and this was recorded in Deed Book 54, page 420 of the Leslie County Court's records. Mrs. Lewis made a second conveyance to her nephew, Berry Lewis, 1950, same being recorded in Deed Book 51, page 456 as mentioned above. The remainder of the property was conveyed to Willie Fields and wife, Mary Lee Fields and recorded in Deed Book 81, page 32 and also named above. The Appellants obtained the remainder of the parent tract from Clara Lewis with the Mable Snyder exception, now owned by Berry Lewis and the Berry Lewis two acre exception. This lawsuit arose as a result of a boundary dispute between the Appellants and Appellee *even though* Clara Fee Lewis made all the conveyances. The specific conveyance in dispute is the Mable Snyder boundary. The Grantor, Clara Fee Lewis, testified on August 28, 1981, by deposition, that she was familiar with the property and

made a deed to Mable Snyder and the property lines were determined before making that deed in a discussion with Mable Snyder actually on the property. The testimony was that Clara and Mrs. Snyder were standing in the county road and she stated to Mrs. Snyder that "you can have it from that black gum tree above the road to two pines on top of the cliff that goes back to Inter Mountain Coal and Lumber Company's land." Mrs. Lewis stated that she pointed in a straight line to the two pine trees that were on top of the cliff on top of the mountain. Clara Lewis depo. (pages 5-6, pages 17-18). This testimony was not disputed by Mable Snyder (now Hamrick) and was confirmed by Arlie Fee, the former husband of Clara Fee Lewis. The only party who disputed same was Berry Lewis, (who could not even remember his own army discharge date) his hired "surveyor," Mr. Walter Hoskins, who had been reprimanded for surveying without a license and was not a surveyor at the time he did that survey, and the father of Berry Lewis, Mr. Dewey Lewis who testified that no strip mining had been done on the property, and then named the parties who did it, proof positive that the mining in fact occurred. Ruth Lewis, Appellee herein, never testified.

The second deed in question is the "house seat" of approximately two acres made by Mrs. Lewis to her nephew, Berry Lewis, Mrs. Lewis testified that the description written by Berry Lewis called for an elder tree and that since he wrote the description he should have known the difference between an elder tree and a cedar tree. It was the testimony of Mrs. Lewis that

there was an elder on the property at the time she made the conveyance (Clara Lewis depo., pages 21 and 11). The testimony of Clara Fee Lewis was confirmed in every respect by that of her former husband, Arlie Fee, and was not disputed by Mable Snyder Hamrick. The Appellants testified consistently with Mrs. Lewis and also took depositions of Robert Fentress, and Frank Bowling, surveyors and neighbors, Walker Huff, and Calvin Turner.

The testimony of old time surveyor, Frank Bowling was relied upon heavily by Appellants. Mr. Bowling has been surveying property in remote areas of Eastern Kentucky since 1925 and went on the disputed property at the request of surveyor Robert Fentress to look at two corner markings. Mr. Bowling looked at two disputed calls, the two pine trees and a black gum tree that Appellee claimed to be corner trees. With reference to the black gum tree claimed as a corner tree, Mr. Bowling testified that the mark on this tree *was not a corner marking* but looked to him like a notch to cut the tree. Mr. Bowling also testified that he did not find any corner markings on the pine trees claimed by Berry Lewis (Bowling depo., pages 2-5).

The dispute involves the location of a line, which was to be a straight line according to the testimony of Grantor, Clara Lewis, and the location of the corner trees. It is important enough for consideration by this Court because it is approximately 25 acres and over $300,000.00 (Three Hundred Thousand) Dollars is in an escrow account at the local bank, Hyden Citizens Bank, to be distributed to the owner of the property.

The Court of Appeals of Kentucky affirmed the decision, citing the lower Court's perogative to make its own decisions as per C.R. 52 and same should not be reversed unless "clearly erroneous" and appellants were denied discretionary review by the Kentucky Supreme Court. The Court of Appeals held that the trial Court was the best judge of the credibility of witnesses even though all proof was taken by deposition.

The question of ownership of property by Plaintiff's was, of course, raised in the original complaint and then a Motion for Summary Judgment citing Kentucky Law was filed moving that the Court establish the line proven by Appellants and their witnesses. The Plaintiffs, now Appellants, moved in their Motion for Summary Judgment that boundaries be established as per the actual location made at the time of the deed with the location that the grantor testified to controlling as per *Hensley* v. *Lewis,* 128 S. W. 2d 917, 278 Ky. 510 (Ky. 1939). The Appellants moved that the Court, through the entire proceedings, consider the testimony of all witnesses in relation to Kentucky Law and establish the boundary line as they requested. The question sought to be reviewed were raised by filing Motions for Summary Judgment, and Proposed Findings of Fact and Conclusions of Law showing the applicable Kentucky Law and the Court ruled contrary to Kentucky Law in ignoring the testimony of the common grantor in the location established by her and went with the survey of a surveyor who was not licensed at the time he made the survey in question and went against deeds of record over fifteen years.

THE FEDERAL QUESTION IS SUBSTANTIAL

The right of private property is a fundamental, sacred, and inalienable right and its protection is one of the most important purposes of our government. No person can be deprived of his property except by the law of the land. *Smith* v. *Keator,* 206 S. E. 2d 203, Appeal dismissed 95 S.C.T. 613, 419 U. S. 1043, 42 L.Ed. 2d 636.

The property of the appellant has been wrongfully taken in this action contrary to the law of the land. It is the position of the appellants that the trial court based its decision on erroneous testimony and erroneous application of the law, and made an erroneous decision in favor of the appellees.

The Court of Appeals and the Kentucky Supreme Court permitted a judgment to stand per *Largent* v. *Largent,* 643 S. W. 2d 261 (Ky. 1982) that does not even correspond with the testimony of Respondent's witnesses and affirmed a judgment that erred as a matter of law in ignoring long established rules of construction in boundary disputes. The Leslie Circuit Court held that the Appellants failed to meet their burden of proof stating that they were never in possession of the area in dispute and that they failed to show a connected chain of title to the property in dispute. The Court acknowledged that Clara Fee Lewis was a common grantor to the Respondent, but chose to ignore her testimony as Grantor to the disputed tracts. The findings of the trial Court were clearly erroneous within the meaning of Kentucky Civil Rule 52 in that the testimony was that Appellants were the record

owners of the property in dispute, they testified they were in constant and continuous possession and Clara Fee Lewis was predecessor in title to her nephew, Appellee, and in a better position to establish the boundary lines as she intended them to be conveyed and Kentucky law holds that the Grantor is in the best position to establish boundary lines as per *Staley* v. *Richmond,* 32 S. W. 2d 546 (Ky. 1930), *Bush* v. *Putty,* 566 S. W. 2d 819 (Ky. Appeals, 1978), *Jones* v. *Wheeldon,* 217 S. W. 2d 221 (Ky. 1949), *Bentley* v. *Napier,* 122 S. W. 2d 180 (Ky. 1909), *Hensley* v. *Lewis,* 128 S. W. 2d 917 (Ky. 1939), *Wagers* v. *Wagers,* 238 S. W. 2d 125 (Ky. 1951).

The Kentucky Reviewing Courts also upheld the Leslie Circuit Court in finding that the Appellants failed to show a connected chain of title when the primary issue was not record title but the boundaries established between the parties. There is no need to prove title in a boundary dispute. *Jones* v. *Wheeldon,* 309 Ky. 184, 217 S. W. 2d 232 (1949).

The Reviewing Kentucky Courts further erroneously upheld the Trial Court in finding that the Respondent had superior title and that lost or misplaced monuments disputed by these parties were merely clerical errors made by the Leslie County Court Clerk in recordation of these various instruments. The Trial Court accepted the testimony of the property owner who had changed a deed, testified untruthfully about the date he was discharged from the army and hired a surveyor who had been reprimanded for surveying without a license. The Trial Court's finding that a call

was left out of a subsequent deed in fact finding number three and the lower Court's judgment is clearly erroneous as a call was *"added"* to the subsequent deed of Ruth Lewis to Berry Lewis.

Under Kentucky law the location established by Grantor must control, *Hensley* v. *Lewis,* 128 S. W. 2d 917, 278 Ky. 510 (Ky. 1939). There is a presumption that a boundary line running from one monument to another is a straight line, *Barney et ux* v. *Orinoco Mining Company,* 257 S. W. 1016 (1923) and a "surveyor" without a license is not a surveyor.

Appellant urges that he has been deprived of his property by erroneous application of Kentucky law and he has no other remedy than review by this Court as he has exhausted state Court review.

The appellant has been deprived of his property and a federal right has been denied by a State Court, and the Supreme Court held in *Great Northern Ry. Co.* v. *State of Washington,* Wash. 1937, 57 S. Ct. 397, 300 U. S. 154, 81 L. Ed. 573, *rehearing denied,* 57 S. Ct. 504, 300 U. S. 686, 81 L. Ed. 888, that they were not precluded by a finding of fact or a mixed finding of law and fact by the state court, but must examine the evidence to ascertain whether it supports the state court's decision against claim of federal right.

The Appellants repeatedly pointed out to the lower Court in Kentucky, and to all reviewing Courts, that the property was being taken by an erroneous application of Kentucky law. The due process claim was never specifically termed as a denial of due process but it is

clear that the property was taken by an erroneous application of Kentucky law.

The due process clause of the Fourteenth Amendment of the United States Constitution is every citizen's guarantee of a fair trial with decisions according to law.

The Constitutional guarantees of due process are to be liberally construed to effectuate their purposes, and are a restraint not only on persons holding positions specifically classed as executive, legislative or judicial but on all administrative administerial officials who act under governmental authority. *Vet* v. *Easly,* (1946) 169 P. 2d 831, 161 Kanas 459). An action of state Courts and state judicial officers in their official capacities is "state action" within the provision of this clause. *Kenney* v. *Foxx,* D. C. Michigan (1955) 132 F. Supp. 305, affirmed 232 F. 2d 288. Due process of law is applicable to every Court. *In re: Hanrahan's Will,* 1937 194A 471, 109 BT 108. Court's, in exercise of their judicial functions, are without power to deprive a person of his property or right of property unless by due process of law. *In re: Andros Will,* 281 N.Y.S. 831, 156 Misc. 268. This clause is a restriction upon employment of methods in state courts which violate this clause. *State* v. *Bird,* (1953) 259 P. 2d 261, 76 Arizona 96. The authorities are uniform in holding that these constitutional provisions are applicable to every form of procedure where life, liberty or property of the person is sought to be taken from him, whether it be by the trial or Appellate Court, sitting alone or aided by a jury, upon information, indictment, citation

or appeal, charged with a misdemeanor, felony, contempt of court, inferior or superior or with any other violation of law, where a judgment or conviction is asked that has taken from him, his life, liberty or property. *Ex Parte Nelson,* (1913) 157 S. W. 794, 251 Missouri 63.

In a case out of Arkansas the Court held that the construction of the Arkansas statutes is for the Arkansas Courts, and such construction is not a matter of federal concern *if* it does not abortively deny recognization to and vindication of plainly vested legal rights so as to violate due process or equal protection under this amendment. *Dickey* v. *Sewer,* Imp. Dist. 1 of Dradinel Arkansas, C.A. Ark. (1964, 328 F. 2d 296 certiorari denied 85 S. Ct. 42, 379 U.F. 821, 13 L. Ed. 2d 32.

Appellant contends that he has shown arbitrary and capricious action ignoring long established rules of construction in Kentucky in regard to boundary disputes which thus deprives him of his property contrary to plainly vested legal rights.

To deny the appellant property which is truly his is contrary to the Fourteenth Amendment. The appellant asserts that he has been deprived by a state court of a fundamental right secured by the Federal Constitution. In *Craig* v. *Harney,* Tex. 1947, 67 S. Ct. 1249, 331 U. S. 367, 91 L. Ed. 1546, the Court held that an independent examination of the facts may be made when a fundamental right has been denied. The appellant contends that, when considering the instant case in light of *Craig, supra,* this matter qualifies as de-

serving for review by the Court as he has been denied a fundamental right.

The Court held in *Stanley* v. *Schwalby,* Tex. 1896, 16 S. Ct. 754, 162 U. S. 255, 40 L. Ed. 960, that so far as a judgment of a state court against the validity of an authority claimed by defendants under the United States necessarily involves the decision of questions of law, as distinguished from questions of fact, it must be reviewed, whether that question depends upon the constitution, laws, or treaties of the United States, on local law, or principles of general jurisprudence.

CONCLUSION

The decision below upholding the erroneous decision of the lower court should be summarily reversed and sent back to the Supreme Court of Kentucky ordering a decision to invalidate the ruling of the trial court. Appellant respectfully requests plenary review by this Court to grant his constitutional right to due process.

Respectfully submitted,

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Attorney for Appellants

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by mailing same U. S. Postage paid to the following: Hon. John C. Scott, Clerk, Supreme Court of Kentucky, 403 Wapping Street, Frankfort, Kentucky 40601; Hon. Leonard Brashear, Attorney at Law, P.O. Box 677, Hyden, Kentucky 41749; Hon. Clay M. Bishop, Judge, 41st Judicial District, P.O. Box 217, 217 Main Street, Manchester, Kentucky 40962; Ms. Effie M. Couch, Leslie Circuit Court Clerk, Hyden, Kentucky 41749; on this the 7 day of August, 1986.

Phyllis R. Smith

PHYLLIS ROBINSON SMITH

APPENDIX

IN THE

SUPREME COURT OF KENTUCKY

No. 86-SC-289-D
(85-CA-433-MR)

WILLIE FIELDS, MARY LEE LEWIS,
and CLARA FEE LEWIS, - - - - - *Appellants,*

v.

BERRY LEWIS, - - - - - - - - - *Appellee.*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Willie Fields, Mary Lee Fields and Clara Fee Lewis, the appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Kentucky denying discretionary review entered herein on May 13, 1986, a true and correct copy of which is attached hereto.

This appeal is taken pursuant to 28 U.S.C. 1257(1).

(s) Phyllis Robinson Smith
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(606) 672-2800

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by mailing same U.S. Postage Prepaid to the following:

Hon. John C. Scott
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Hon. Clay M. Bishop
Judge, 41st Judicial District
P.O. Box 217
Manchester, KY 40962-0217

Effie M. Couch
Leslie Circuit Court Clerk
Hyden, KY 41749

on this the 24th day of July, 1986.

(s) Phyllis Robinson Smith
Phyllis Robinson Smith

IN THE

SUPREME COURT OF KENTUCKY

86-SC-289-D
(85-CA-433-MR)

WILLIE FIELDS, MARY LEE FIELDS
and CLARA FEE LEWIS - - - - - *Movants*

v.

BERRY LEWIS - - - - - - - *Respondent*

LEWIS CIRCUIT COURT
No. 80-CI-184

ORDER DENYING DISCRETIONARY REVIEW

The motion of the movant for a review of the decision of the Court of Appeals is denied.

ENTERED May 13, 1986.

(s) Robert F. Stephens
Chief Justice

OPINION RENDERED: MARCH 28, 1986; 3:00 P.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 85-CA-433-MR

CLARA FEE LEWIS,
WILLIE FIELDS, and
MARY LEE FIELDS - - - - - - - *Appellants*

v.

BERRY LEWIS - - - - - - - - *Appellee*

Appeal from Leslie Circuit Court
Honorable Clay M. Bishop, Judge
Civil Action No. 80-CI-184

AFFIRMING—Filed April 2, 1986

BEFORE: CLAYTON, LESTER and REYNOLDS, Judges.

LESTER, JUDGE. This is an appeal from a judgment entered upon findings of fact and conclusions of law establishing a boundary line and quieting title in the appellee.

The facts of this matter are well known to the parties, and therefore we will not restate them at length. The court heard voluminous testimony about where a boundary line should be. Based on the extensive evidence, including lay testimony of the parties and surrounding land owners, as well as surveyors, the court reached its conclusions.

Civil Rule 52.01 limits our function to a determination as to whether the findings are clearly erroneous.

Our review of the record indicates that this cause centers around the credibility of the witnesses as to the disputed location of various boundary markers. The trial court had the opportunity to judge the credibilty of the witnesses and make a resolution as to the factual disputes. We held that there is sufficient evidence to support those findings and that they are reasonable in every respect and therefore, we cannot find them to be clearly erroneous.

The judgment is affirmed.

ALL CONCUR.

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LESLIE CIRCUIT COURT

Civil Action No. 80-CI-0184

CLARA FEE LEWIS, Single
WILLIE FIELDS and WIFE,
MARY LEE FIELDS - - - - - - - *Plaintiffs*

v.

BERRY LEWIS - - - - - - - - *Defendant*

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This action was filed in the Leslie Circuit Court on the 4th day of September, 1980 by the Plaintiffs claiming to be the owners of a tract of land, and for a Restraining Order claiming the Defendant Berry Lewis was claiming property outside his boundary. They were further asking that title be quieted, and for damages.

The Defendant Berry Lewis answered said Complaint, and set up ownership to the tract of land by Counter Claim. The Defendants Berry Lewis and wife Ruth Lewis' tracts of land were specifically excepted from the Deed of Conveyance which the Plaintiffs Willie Fields and wife claimed this property through. Further, the Defendant Berry Lewis sought damages for being wrongfully restrained from his property by the Plaintiffs.

FINDINGS OF FACT

1) The Court finds that the Restraining Order issued herein was dissolved on Motion of the Defendant, and the case came down for trial by depositions on the question as

to the true location of the boundary line between the Parties to this law suit.

2) The Common Grantor was Clara Fee Lewis and her predecessors in title, and the Court having considered all the numerous depositions taken, including the depositions of the two engineers to wit: Robert Fentress and Walter Scott Hoskins, finds that the real question involved here is the location of the dividing line between the tract of the Defendant's property and the Plaintiffs property.

3) There was much proof taken, but the Court is persuaded by the testimony of Walter Scott Hoskins, the Registered Licensed Engineer and Surveyor used by the Defendant Berry Lewis to locate the boundary of the dispute. The testimony and findings Mr. Hoskins made coincide with the original markings made on the boundary by Dewey Lewis who marked the boundary line to the 25 acre tract conveyed by Clara Fee Lewis to Mable Snyder, and from Mable Snyder to Ruth Lewis, the wife of Berry Lewis. The fact that the Engineer Walter Scott Hoskins was able to find the marked trees which were identified by Mr. Dewey Lewis, and he located them according to the Deed of the Defendant Ruth Lewis.

4) The Court finds that within the deed of Mable Snyder to Ruth Lewis, that one call in said deed was erroneously left out, but the Court finds that the next deed within the Chain of Title was a deed from Clara Fee Lewis to Mable Snyder. That Deed has the missing call, and the description is identical other than the missing call. The Court finds that was merely clerical error.

5) The Court finds on each of the defendant's tracts of land there was ample proof to show Berry Lewis and wife Ruth Lewis had been in possession of their two tracts, the twenty-five (25) acre tract and the two (2) acre tract, from the time their deeds were made to the time this law suit was filed; and that they are still the owners, and that

the proper location of the two tracts of land as set out in the Complaint herein show there is no conflict in the boundaries of these parties, and that the Plaintiff failed to carry their burden of proof showing that they were the owners of any of the two tracts of land set out as exception to their boundary.

6) This is further illustrated by the Deeds which are the subject of this law suit. The deed from Clara Fee Lewis to Mable Snyder, and from Clara Fee Lewis to Berry Lewis for the two (2) acre tract, are prior to the deed in which the Plaintiffs herein claim under, and the Plaintiffs deed specifically excepts out the two prior conveyances which Berry Lewis and wife now claim under.

7) Further, the Court finds that the dispute as to the clerical error in the description in the deed from Clara Fee Lewis to Berry Lewis dated February 18, 1950, and recorded in Deed Book 51, Page 456, records of the Leslie County Court Clerk's Office. Said dispute was that on the records in the Leslie County Court Clerk's Office a clerical mistake was made in transcribing "cedar" and "elder" was placed instead. The Court finds that a copy of the original deed was filed in evidence in this case, and this is the best evidence of the description. The Court finds that "cedar" is the appropriate call.

8) The Court further relies on the Findings of the clerical error in fact that there was no proof which was submitted that showed "elder" tree existing. Their only proof being "elder sprouts" being around a certain call, but the testimony was whether it was in "elder" or "shumak"., and the Court finds the call was for a "cedar tree".

9) The Court further finds that the line between the Plaintiffs property and the Defendants property is as located by the surveyor, Walter Scott Hoskins, and as plotted on his map as filed with the deposition of said Walter Scott

Hoskins. Each monument was located as called for in the various deeds as far as making the location and acreage. The deed specifically called for a definite number of acres, and the survey of Walter Scott Hoskins closely fits the acreage as so called for in the deed.

10) The Court finds that the witnesses for the Defendant testified as to the boundary lines had some personal knowledge of the property lines, and that the witnesses for the Plaintiff Willie Fields, et al., were shown the alleged property lines by the Plaintiff, Willie Fields, and the Court finds the Plaintiff's testimony not as competent as the Defendant's witnesses.

11. This is further substantiated in the fact that the markings which were relied upon by Willie Fields as to the boundary lines were fresh hacks into trees with freshly painted markings. These can be seen in the photographs within the record which are marked as Exhibits thereof.

12. The Court finds in this suit that the Plaintiffs tried to claim damage for having a mine operation interrupted. The Court finds from the evidence there was no mine operation in progress as seen in the proof, wherein no permit was ever presented to the Court. The only disturbance was the construction of a roadway, and from excavation down upon the property with the permission of Berry Lewis. Therefore, the Court finds that there is no damage to the Plaintiffs for interference with the mining operation, because no mining permit ever existed upon said property.

13. The Court finds that the people who were most knowledgeable of the correct location of these deeds, and the actual making of the deed testified to the location of Berry Lewis' property lines, the Defendant herein.

CONCLUSIONS OF LAW

1. The Court concludes the burden of proof was upon the Plaintiffs since they asserted title, the burden was on

them to show that they were the owners of the property claimed.

2. The Court concludes that the Plaintiffs failed to meet their burden of proof for the following reasons:

FIRST, being the Plaintiffs were never in possession of the area in dispute, designated as the Berry Lewis tracts, and therefore, title could not be quieted in them since they were never in possession at the time of the lawsuit.

SECOND: The Plaintiffs failed to show a connected chain of title to the property in dispute. In fact, they proved that Berry Lewis was the owner of the two (2) tracts because their deeds specifically sets out the Berry Lewis and Ruth Lewis tracts.

THIRD: When the Court reviewed the evidence, it found there was no overlap in the property lines, and the Defendant is the owner in fee simple of the two tracts of land that Berry Lewis and Ruth Lewis claimed in their Answer and Counterclaim. Further, they derived title from a common grantor, Clara Fee Lewis, from conveyances directly from her or from a Grantee of Clara Fee Lewis as shown by the Berry Lewis and Ruth Lewis Deeds.

3) The Court concludes further that the Temporary Restraining Order was granted improvidently, and should not have geen granted, and by reason thereof, the Defendant, Berry Lewis, was hindered in the peaceful use and enjoyment of his property pending this action, and that he is entitled to damages, therefore, in the amount of Three Thousand Seven Hundred ($3,700.00) Dollars.

4) The Court concludes that Berry Lewis was the owner of a superior title to his two tracts of land set out in his answer and counterclaim, and described in the evidence, and that he was in actual possession of said land, and is entitled to have his title quieted to said tracts of land.

5) The Court concludes that the original deed from Clara Fee Lewis to Berry Lewis that a clerical error was made and the call in said deed is "cedar tree" not "elder".

6) The Court concludes that there was a recording error in the deed made from Mable Snyder to Ruth Lewis, but that said call was in the prior deed to the predecessor in title, and that Court, therefore, finds this is found a clerical error, and the call should have been inserted into the deed, and the call is part of the deed.

JUDGMENT

In accordance with the above Findings of Fact and Conclusions of Law, it is now ordered by the Court as follows:

1) That the Plaintiffs, Willie Fields, Clara Fee Lewis and Mary Lee Fields, complaint be and the same is hereby dismissed, and the Defendant, Berry Lewis is adjudged to be the owner in fee simple of the two deed tracts set out in their Answer and Counterclaim and described in two deeds, and described in the evidence in this case.

2) It is further adjudged that the Defendant, Berry Lewis, is entitled to recover the sum of Three Thousand Seven Hundred ($3,700.00) Dollars for damages by the wrongful Restraining Order being issued and in the interference of his peaceful use of the land, and further, due all his cost herein expended, and this title to the two said deed boundaries is forever quieted against the Plaintiffs, or any persons claiming through or by them.

Given Under My Hand as Judge, Leslie Circuit Court, this the 7th day of November, 1984.

(s) Clay M. Bishop
Judge, Leslie Circuit Court

DEED OF CONVEYANCE

THIS DEED OF CONVEYANCE, made and entered into this 20th day of December 1947, between Clara Fee Lewis, Leslie County party of the first part, and Mabel Snyder of Leslie County party of the second part,

WITNESSETH: That said part of the first part for and in consideration of the sum of 300.00 the receipt of which is hereby acknowledged, doeth hereby sell and convey to the part of the second part, her heirs and assigns, the following described property, to-wit: A certain tract or parcel of land lying in Leslie County, Kentucky, on Greasy Creek of Middle Fork of Ky River and being same land conveyed to the first parties by W. J. Maggard Master Commissioner of Leslie Co. by deed bearing date, Nov. 18th 1947 Commissioners Deed which is duly recorded in deed book 49, page 286 County Court Clerks' Office, containing 25 acres more or less.

Beginning on top of the mountain corner of Clara Fee and Inter Mountain Coal & Lbr. Co. thence a southwest call to cliff between Two pines trees thats marked with 3 marks each thence Thence straight down the Mountain to black gum tree thence same course to a flat rock thence same course to Greasy Creek, thence turning eastwardly up Greasy Creek with the Inter-Mountain Coal & Lbr. Co. line to a black gum tree, thence up small drean thence up northwardly direction to where water runs over a cliff thence running on up said drean to top of mountain of the beginning corner.

TO HAVE AND TO HOLD the same, together with all appurtenances thereunto belonging unto the party of the second part her heirs and assigns forever. And the said party of the first part hereby covenants with the said party of the

second part, that she will warrant the title to the property hereby conveyed unto the said party of the second part and her heirs and assigns forever.

IN TESTIMONY WHEREOF, the party of the first part has hereunto subscribed name the day and year aforesaid.

Witnesses: Clara Fee Lewis

Alvin Boggs
F. G. Turner

STATE OF KENTUCKY, } Clerk's Certificate of
LESLIE COUNTY, } Acknowledgment

I, Jimmie Sizemore, Clerk of the County Court of the County and State aforesaid, certify that the foregoing Deed of Conveyance from Clara Fee Lewis to Mabel Snyder was on the 20th day of December 1947, produced to me in said County and acknowledged before me by Clara Fee Lewis party grantor thereto, to be her act and deed.

Given under my hand, this 20 day of Dec. 1947.

Jimmie Sizemore, Clerk
By Ruth Smith Boggs, D. C.

STATE OF KENTUCKY, } Clerk's Certificate of Lodgment
LESLIE COUNTY, } and Record

I, Jimmie Sizemore, Clerk of the County Court for the County and State aforesaid, certify that the foregoing Deed was on the 21st day of February, 1948, lodged for record, whereupon the same, with the foregoing and this certificate have been duly recorded in my office.

Witness my hand, this 21st day of February, 1948.

Jimmie Sizemore, Clerk
By Rachel Pace, D. C.

DEED OF CONVEYANCE

THIS DEED OF CONVEYANCE, made and entered into this the 18 day of February 1950, between Clara Lewis party of the first part, and Berry Lewis party of the second part witnesseth: That said party of the first part for and in consideration of the sum of $75.00 Seventy Five dollars in hand paid the receipt of which is hereby acknowledged do hereby sell and convey to the party of the second part, Her heirs and assigns, the following described property, to-wit: A certain tract or parcel of land lying in Leslie County, Kentucky, on Greasy fork of the Middlefork of Kentucky River and being same land conveyed to the first parties by Arlee Fee by deed bearing date, Nov. 18, 1947, which is duly recorded in deed book 49, page 286 County Court Clerk's office containing 2 acres more or less.

Beginning on a white oak known as Enoch Lewis; thence runing a strate line northwardly to a elder marked with 3 marks thence a strate line Eastwardly to a planted stone on the line of Mable C. Snyder deed thence southward with a line of same to a marked stone thence a strate line to the center of Greasy Creek, thence running down Greasy to within a strate line of the beginning, thence a strate line to the beginning containing too acres more or less.

To have and to hold the same, together with all appurtenances thereunto belonging unto the party of the second part her heirs and assigns forever. And the said party of the first part hereby covenants with the said party of the second part that she will warrant the title to the property hereby conveyed unto the said party of the second part and her heirs and assigns forever.

A lien is retained upon the property hereby conveyed as security for the payment of the said unpaid purchase money.

In Testimony Whereof, the party of the first part has hereunto subscribed her name, the day and year aforesaid.

Clara Lewis

State of Kentucky, } Clerk's Certificate of
Leslie County, } Acknowledgment.

I, Jimmie Sizemore, Clerk of the County Court for the County and State aforesaid, certify that the foregoing Deed of Conveyance from Clara Lewis to Berry Lewis was on the 18 day of February 1950, produced to me in said County and acknowledged before me by Clara Lewis party grantor thereto, to be her act and deed.

Jimmie Sizemore, Clerk
By I. D. Miniard, D. C.

State of Kentucky, } Clerk's Certificate of Lodgment
Leslie County, } and Record.

I, Jimmie Sizemore, Clerk of the County Court for the County and State aforesaid, certify that the foregoing Deed was in the 22nd day of March 1950, lodged for record, whereupon the same, with the foregoing and this certificate have been duly recorded in my office.

Witness my hand, this 22nd day of March, 1950.

Jimmie Sizemore, Clerk
By Cora Sizemore, D. C.

DEED OF CONVEYANCE

CLARA LEWIS

TO DEED

BERRY LEWIS

I, _____

Acknowledged before me in due form

by _____

_____

_____

Lodged for Record March 22, 1950
Recorded in Deed Book No. 51
Page 456
Fee for Recording _____ $ 1.25
Additional Certificate _____
Additional Tract _____
State Tax _____ 1.00

THIS DEED OF CONVEYANCE, made and entered into this the 18th day of February, 1950, between Clara Lewis party of the first part, and Berry Lewis party of the second part, witnesseth: That said party of the first part for and in consideration of the sum of $75.00 Seventy-Five Dollars Hand Paid _____ the receipt of which is hereby acknowledged, do hereby sell and convey to the party of the second part, his heirs and assigns, the following described property, to-wit: A certain tract or parcel of land lying in Leslie County, Kentucky, on Greasy fork of the middle fork of Kentucky River and being Same land conveyed to the first parties by Arlee Fee by deed bearing date, Nov. 18, 1947, which is duly recorded in deed book 49, page 286, County Court Clerk's office containing 2 acres more or less.

Beginning on a White oak known as Enoch Lewis thence runing a strate line northwardly to a ceder marked with 3 marks thence a strate line Eastwardly to a planted stone on the line of Mable C. Snyder deed thence southward with a Line of Same to a Marked Stone thence a strate Line to the Center of Greasy Creek thence running down Greasy to within a strate line of the Beginning (thence a strate line to the Beginning. Containing too acres more or less.

STATE OF KENTUCKY, } Clerk's Certificate of
LESLIE COUNTY, } Acknowledgment

I, Jimmie Sizemore, Clerk of the County Court for the County and State aforesaid, certify that the foregoing Deed of Conveyance from Clara Lewis to Berry Lewis was on the 18 day of February 1950, produced to me in said County and acknowledged before me by Clara Lewis tract granted thereto, to be His act and deed.
Given under my hand, this 18 day of February 1950.

Jimmie Sizemore, Clerk
By I. D. Miniard, D. C.

STATE OF KENTUCKY, } Clerk's Certificate of Lodgment
LESLIE COUNTY, } and Record

I, Jimmie Sizemore, Clerk of the County Court for the County and State aforesaid, certify that the foregoing Deed was on the 22nd day of March 1950, lodged for record, whereupon the same, with the foregoing and this certificate have been duly recorded in my office.

Witness my hand, this 22nd day of March 1950.

Jimmie Sizemore, Clerk
By Cora Sizemore, D. C.

To have and to hold the same, together with all appurtenances thereunto belonging unto the party of the second part Her heirs and assigns forever. And the said party of the first part hereby covenants with the said party of the second part, that She will warrant the title to the property hereby conveyed unto the said party of the second part and Her heirs and assigns forever.

A lien is retained upon the property hereby conveyed as security for the payment of the said unpaid purchase money.

In testimony whereof, the party of the first part has hereunto subscribed Her name, the day and year aforesaid.

Clara Lewis

DEED OF CONVEYANCE

THIS DEED OF CONVEYANCE, made and entered into this 6th day of March 1953, between Mabel Snyder party of the first part, and Ruth Lewis party of the second part, witnesseth: That said party of the first part, for and in consideration of the sum of One dollar in hand paid and other good and valuable considerations, in hand paid the receipt of which is hereby acknowledged do hereby sell and convey to the party of the second part, her heirs and assigns, the following described property, to-wit:

A certain tract or parcel of land lying in Leslie County on Greasy Creek of the Middle Fork of the Kentucky River and bounded and described as follows, to-wit:

Beginning on top of the mountain, corner of Clara Fee and Intermountain Coal and Lumber Company; thence straight down the mountain to a blackgum tree; thence same

course to a flat rock; thence same course to Greasy Creek; thence turning eastwardly up Greasy Creek with the Intermountain Coal and Lumber Company line to a blackgum tree; thence up small drain; thence a northernly direction to where water runs over a cliff; thence running on up said drain to the top of the mountain to the beginning corner.

This being the same property conveyed to Mabel Snyder by Clara Fee Lewis on the 20th day of December, 1953, deed to same recorded in Deed Book No. 48, page 429, Leslie County Clerk's Office.

To have and to hold the same, together with all the appurtenances thereto belonging, unto the party of the second part, her heirs and assigns forever. And the said party of the first part hereby covenant with the said party of the second part that she will warrant the title to the property hereby conveyed unto the said party of the second part her heirs and assigns forever.

IN TESTIMONY WHEREOF, the party of the first part has hereunto subscribed her name the day and year aforesaid.

Mabel Snyder

In testimony whereof, witness our signatures this 20th day of May 1953.

William Lee Taulbee
Bernice Taulbee

STATE OF KENTUCKY
COUNTY OF LEWIS } SCT.

I, Chas. Johnson a notary public for the county and State aforesaid, do certify that the foregoing Deed from William Lee Taulbee and Bernice Taulbee to Ace Gilbert and Lola Mae Gilbert his wife was on the 20th day of May

1953, produced to me in said County and acknowledged and delivered by William Lee Taulbee and Bernice Taulbee parties grantors thereto to be their act and deed.

Given under my hand, this 20th day of May 1953.

(SEAL)

Chas. Johnson
Notary Public

STATE OF KENTUCKY
COUNTY OF LESLIE } SCT.

I, Jimmie Sizemore, Clerk of the County Court for the County and State aforesaid, certify that the foregoing Deed was on the 23rd day of May 1953, lodged in my office for record, whereupon the same with the foregoing and this certificate have been duly recorded in my office.

Given under my hand, this 23rd day of May 1953.

Jimmie Sizemore, Clerk
By (s) Melda Faye Sizemore, D.C.

THIS DEED, between Clara Lewis, of Leslie County, Kentucky party of the first part, and Willie Fields and wife Mary Lee Fields of Leslie County, Kentucky parties of the second part, witnesseth: That said party of the first part, for and in consideration of the sum of one-dollar ($1.00) and other valuable considerations, cash in hand paid the receipt of which is being acknowledged, do hereby sell, grant and convey to the parties of the second part their heirs and assigns, the following described property, to-wit: Lying and being in Leslie County, Kentucky, on Lick Branch, waters of Greasy Creek and Greasy Creek and being more fully described in a deed of conveyance, dated November 17, 1947, and recorded in deed book 49 at page

286-287, records Leslie County Court Clerks Office—References made to said deed for a more definite description of the land herein conveyed. Said land was conveyed to the grantor Clara Fee on November 17, 1947, by Arlie Fee, by W. J. Maggard, Master Commissioner, Leslie Circuit Court.

EXCEPTIONS:

It is understood that the grantor herein, Clara Fee Lewis, has heretofore conveyed to Mabel C. Snyder a parcel of the above described tract and same is excepted from this conveyance. Said deed is dated December 20, 1947, and recorded in deed book 49 at page 429 records Leslie County Court Clerks Office, to which reference is here made for a description of said boundry exception.

There is also excepted from the above conveyance a tract of land conveyed by Clara Lewis to Berry Lewis, by deed dated February 18, 1950, and recorded in deed book 51 at page 456 Leslie County. References is made for said deed for a description of the parcel exception.

Also there is excepted from the boundary conveyed and other tract conveyed by Clara Lewis to Estil Coots, by deed dated February 15, 1952, and recorded in deed book 53 at page 425, records Leslie County Court Clerks Office. References made to this deed for a description of the exception in this conveyance.

It is understood and agreed by and between the parties hereto that the grantees, Willie Fields and wife Mary Lee Fields will not sale or convey the above described land, during the lifetime of the first party, Clara Lewis.

Being the same land conveyed as aforesaid to_____ _____by Deed bearing date_____day of _____19____, and of record in Deed Book No._____ at page _____, _____County Clerk's Office.

To have and to hold the same, together with all the appurtenances thereunto belonging unto the parties of the second part their heirs and assigns forever, with covenant of general warranty.

In testimony whereof, witness our signatures this 22nd day of April, 1957.

(s) Clara Lewis

STATE OF KENTUCKY }
COUNTY OF LESLIE } SCT.

I, Jimmie Sizemore, Clerk of the County Court for the County and State aforesaid, do certify that the foregoing Deed from Clara Lewis to Willie Fields and Mary Lee Fields was on the 22nd day of April, 1957, produced to me in said County and acknowledged and delivered by Clara Lewis, party grantor thereto to be her act and deed.

Given under my hand, this 22nd day of April, 1957.

Jimmie Sizemore, Clerk
By (s) illegible , D.C.

STATE OF KENTUCKY }
COUNTY OF LESLIE } SCT.

I, Earl Fields, Clerk of the County Court for the County and State aforesaid, certify that the foregoing Deed was on the 1st day of August, 1975, lodged in my office for record, whereupon the same with the foregoing and this certificate have been duly recorded in my office.

Given under my hand, this 1st day of August, 1975.

Earl Fields, Clerk
By (s) Ruth Hamblin, D.C.

Supreme Court, U.S.
FILED
SEP 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-213

In The
Supreme Court of the United States
October Term, 1986

WILLIE FIELDS, MARY LEE FIELDS,
Appellants,

vs.

BERRY LEWIS, RUTH LEWIS,
Appellees.

On Appeal from the Supreme Court of Kentucky

MOTION TO DISMISS AND AFFIRM

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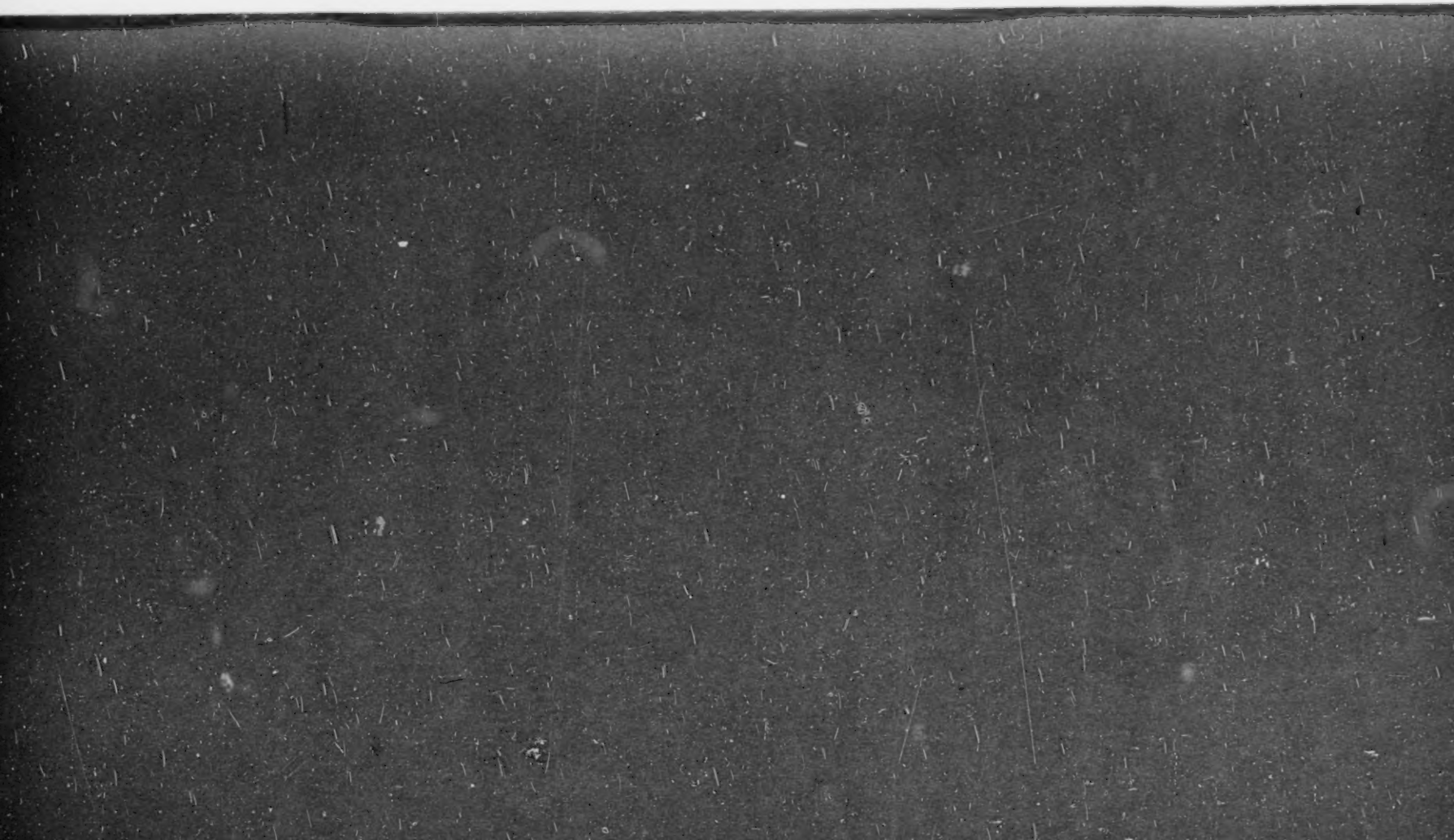

QUESTIONS FOR REVIEW

I. Whether the Trial Court erred as a matter of law, thus depriving the Appellants of their property in violation of the Fourteenth Amendment to the United States Constitution.

II. Whether the Trial Court's action in locating the boundary was clearly erroneous.

III. Whether the United States Supreme Court has jurisdiction to hear the case upon appeal from the Supreme Court of Kentucky.

IV. Whether there is a real case in controversy existing in this case.

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INTRODUCTION

This is an appeal taken by Willie and Mary Fields from a Decision of the Leslie Circuit Court adjudging the Appellees, Berry Lewis and his wife, Ruth Lewis, the owner of a certain tract or boundary of land containing approximately 15 acres. The Leslie Circuit Court, in Civil Action No. 80-CI-0184, found that the Defendant, Berry Lewis, was the owner of the disputed boundary of land which is located in a rural area of Leslie County, being known as Greasy Creek on the Middle Fork of the Kentucky River. The Court of Appeals in a Decision dated and filed April 2, 1986, before Clayton, Lester and Reynolds, affirmed the decision stating that the record was voluminous about the existence of a boundary line dispute and under Kentucky Rule of Civil Procedure 52.01, they could not find that the findings were clearly erroneous. They specifically held that the record indicates that the Decision centered around the credibility of the witness as to the disputed location of various boundary lines holding that the Trial Court had the opportunity to judge the credibility of the witnesses and make a resolution as to disputed facts, they affirmed the decision as holding that the decision was not clearly erroneous pursuant to Civil Rule 52.01.

The Supreme Court of Kentucky denied Discretionary Review on May 13, 1986 and this Appeal resulted.

This case arises with reference to four deeds of conveyance. The first Deed being a deed dated December 20, 1947 between Clara Fee Lewis to Mable Snyder. This Deed was recorded in the Leslie County Court Clerk's Office on February 21, 1948.

The second deed of conveyance is a Deed of Conveyance from Clara Lewis to Berry Lewis dated February 18, 1950 and recorded March 22, 1950. This was for approximately a two acre tract. Within this deed is a disputed call between the parties being whether a call to an "elder" or to a "cedar" was meant. Within the appendix of Appellants at Page 14a and 17a, for the Court's convenience, a copy of the recorded version of the deed is found as well as a copy of the original. The original Deed calls for a cedar and the recorded calls for an elder.

The third Deed of Conveyance was between Mable Snyder to Ruth Lewis the wife of Berry Lewis for the tract of land which she had received from Mable Snyder in Deed Book 48, Page 429, records of the Leslie County Court Clerk's Office. This deed was dated March 6, 1953 and recorded May 23, 1953.

The final deed of conveyance which is in dispute is a deed between Clara Lewis to Willie Fields and wife, Mary Lee Fields in a Deed of Conveyance dated April 22, 1957 but not recorded until August 1, 1975. Within that deed the prior two deeds have been excepted out specifically. A copy of these Deeds are found in the Appendix of the Appellant's Jurisdictional Statement, for the Court's convenience.

STATEMENT OF THE MOTION

Comes now the Appellee, Berry Lewis and Ruth Lewis, and pursuant to Supreme Court Rule 16B, moves this Court to dismiss the Appeal of the Appellant for the following reasons:

1. The Appeal is not within the jurisdiction of the Supreme Court of the United States because there is no substantial federal question.

2. The federal question which is sought to be reviewed was not timely or properly raised and was not expressly passed on by any court within the Commonwealth of Kentucky.

3. This Judgment rests on an adequate non-federal basis.

4. The Appellants, Willie Fields and Mary Fields, do not have standing to bring this appeal for reason that on the 23rd day of January, 1985, they conveyed the disputed tract to their son, Randy Fields.

5. There is no current case in controversy since the Appellants conveyed away all their interest in the disputed tract.

In the alternative, the Appellee moves the Court to affirm the decision of the Supreme Court of Kentucky for the reasons that the Civil Rule of Kentucky 52.01 was completely complied with and that the evidence within the record clearly illustrates that the Judgment of the Kentucky Supreme Court, Court of Appeals of Kentucky and Leslie Circuit Court were not clearly erroneous.

In the alternative, the Decision of the Supreme Court of Kentucky should be affirmed since the decision or the federal question involved is so manifest and unsubstantial as to need no further argument.

———o———

COUNTERSTATEMENT OF THE CASE

This case involves a boundary line dispute involving adjacent property owners located on Greasy Creek in rural Leslie County, Kentucky. The question of ownership arises out of four conveyances as listed in the introduction above. The Plaintiffs filed suit attempting to establish ownership of approximately 1.1 acres of the 2 acre tract of land of Berry Lewis and approximately 13.9 acres of land of the 25 acre tract belonging to Ruth Lewis.

Both the Plaintiffs and Defendants took extensive proof with reference to the locations of the boundary lines of the two adjoining land owners. Each called a registered surveyor and persons who claimed to have knowledge about the boundary line dispute. Since the record is so voluminous a brief summary of the testimony of the witnesses shall be included for the Court's convenience.

Mrs. Clara Lewis, the common Grantor, testified on behalf of the Plaintiffs. First of all, she stated that she conveyed away all of her property which is the subject of this dispute and only claims a life estate upon the tract which she conveyed to Willie Fields and wife, in Deed Book 81, Page 32. This life estate was conveyed to Clara Lewis by Willie Fields and wife after the original conveyance had been made.

Mrs. Lewis stated she really did not know who made the Deeds or where the boundary lines were at all. (Lewis Deposition, pp. 5-6). Also, the only thing she knew about the property was that she had made two deeds and that they are the boundaries which are at issue in this case. She stated that she did not remember that she had made a deed to the Plaintiffs, Willie and Mary Fields until she was

reminded by the Defendant's attorney that she had done so (Clara Lewis Deposition, p. 20).

A second witness which the Appellants rely heavily upon is that of Arlee Fee. Mr. Fee testified that he knew nothing about the lines which were made after the Master Commissioner's deed, which was an action to sell this property due to his failure to pay a debt. He testified that he had no knowledge as to the boundary lines as to the Berry Lewis tract or the Mable Snyder Tract (Arlee Fee Deposition, pp. 23-24). Finally, he stated that the only knowledge that he had was through walking the lines with the Plaintiff, Willie Fields, prior to testifying in this matter (Arlee Fee Deposition, p. 24).

Mr. Willie Fields testified on his own behalf. Mr. Fields stated his deed was the third deed made from the original Clara Fee Lewis tract, and he testified as to his description which was totally inadequate, but simply referred to the Master Commissioner's deed made to Clara Lewis and specifically excepted out the Berry Lewis and Mable Snyder tracts of land.

The most important witness called by the Plaintiffs was Bob Fentress, a licensed and registered land surveyor in the State of Kentucky. He testified he went on the property to do a survey at the request of Plaintiff, Willie Fields. He testified Mr. Fields showed the specific locations of the trees and of the calls of the deed. He stated the markings on the boundary trees as claimed by Berry Lewis were much older markings than those claimed by Willie Fields. He also testified his survey would only be correct if what Willie Fields told him was true (Bob Fen-

tress Deposition, pp. 6, 7 and 11). Mr. Fentress admitted that his survey was done by the illustration of Willie Fields to the entire boundary. Mr. Fentress even stated he did not run the boundary lines of the two exception deeds, namely, the Berry Lewis and Ruth Lewis tracts but only ran out what Mr. Fields retained out of the original deed.

The Defendant, Berry Lewis, offered Mr. Walter Scott Hoskins, a professional engineer, Number 7811 and registered land surveyor for Kentucky, Number 2359, as his expert witness. It should be noted that the Appellant's attack stating that Mr. Hoskins was not a land surveyor or engineer, is completely without merit and needs no further discussion. Mr. Hoskins testified he took the original tract of Clara Fee Lewis; plotted the parent tract and then plotted the two-acre exception and the twenty-five acre tract of Berry Lewis and wife, Ruth Lewis; then what was left is what Willie Fields had. Mr. Hoskins used the original deed, the recorded deeds and went upon the property and located each marking and boundary line of the property.

The gist of Mr. Hoskins's testimony is found in his maps within the record and filed as an Exhibit with his deposition. Mr. Berry Lewis, Henry Miniard, Alvin Boggs, Roy Howard all testified and agreed with the boundary lines as found by Walter Scott Hoskins.

Finally, Mr. Dewey Lewis stated he was acquainted with the property for about fifty-three years. He specifically marked the boundaries himself of the 25-acre tract (Dewey Lewis Deposition, pp. 62-67).

ARGUMENT

The Supreme Court of the United States has no general Appellate jurisdiction over judgments and decisions of the State Court but derives them only within statutes or the Constitution. Under 28 U.S.C. § 1257, the Supreme Court can review certain final judgments or decrees rendered by State Courts. Before the Court has jurisdiction to review these State decisions, certain questions and elements must be present before the case is ripe for review.

Since the Appellant jurisdiction of the Supreme Court extends only to cases defined by Congress and may be exercised only in the manner prescribed, a jurisdictional statute such as 28 U.S.C. must be strictly construed. *Palmore v. United States*, 411 U.S. 389, 93 S.Ct. 589, 36 L. Ed. 2d 342. The elements which must be present prior to jurisdiction being exercised by the Supreme Court are as follows, to-wit:

1. There must be a substantial Federal question involved in the case.

2. There must be a final judgment of the highest State Court with reference to the decision.

3. The federal question presented to the Court to be ruled upon must have been decided by the State Court.

4. The federal question must have been timely raised within the State Courts.

Since the Supreme Court is not a Court of general jurisdiction, prior to the exercising of the jurisdiction under 28 U.S.C. § 1257, there must be a substantial Federal question in the case. That is, the question must not be of

mere form, but must be real and substantial. *Cuyahoga River Power Company v. Northern Ohio Traction and Light Company,* 252 U.S. 388, 40 S.Ct. 404, 64 L. Ed. 626. *Equitable Life Assur. Soc. v. Brown,* 187 U.S. 308, 23 S.Ct. 123, 47 L. Ed. 190. *Palmer Oil Corporation v. Amerada Petroleum Corporation,* 343 U.S. 390, 72 S.Ct. 842, 96 L. Ed. 1072.

The substantial Federal question presented to the Court must have been timely raised before the Court may have jurisdiction to review the decision of the State Court. It must affirmatively appear from the record, at least by clear and necessary implication, that a substantial question was presented to the State Court and was passed upon by that Court. *Durely v. Mayo,* 351 U.S. 277, 76 S.Ct. 806, 100 L. Ed. 1178. *Yazoo and M. R. Company v. Adams,* 180 U.S. 41, 21 S.Ct. 256, 45 L. Ed. 415.

The Federal question must be brought to the attention of the State Court deciding the case. *Green Bay & Mississippi Canal Co. v. Patten Paper Company,* 172 U.S. 58, 19 S.Ct. 97, 43 L. Ed. 364. The record filed with the Supreme Court must illustrate the Federal question was raised in the State Court. *Whitney v. California,* 274 U.S. 357, 47 S.Ct. 641, 71 L. Ed. 1095.

No particular means is mandated in which to raise the Federal question, but it must appear clearly within the record that the State Court actually considered and decided the Federal question. *Manhattan Life Insurance Company v. Cohen,* 234 U.S. 123, 34 S.Ct. 874, 58 L. Ed. 1245.

The Federal question must be real and substantial and have been presented with sufficient clarity or definiteness

before the Supreme Court has jurisdiction to review the decision of the State Court. *Seaboard A. L. Railway v. Padgett,* 236 U.S. 668, 35 S.Ct. 481, 59 L. Ed. 777.

The case which is presented to the Court by the Appellants herein is one in which a Due Process Fourteenth Amendment right is claimed. Under the guidelines of jurisdiction of the Supreme Court, as stated above, there is no jurisdiction by this Honorable Court to review the Decision of the Courts of Kentucky.

The Due Process, Equal Protection Clause does not extend to this situation of a boundary line dispute. The Appellants herein had a full trial with right to cross-examine all witnesses and the right to place into evidence their witnesses. They had the opportunity to write extensive briefs and used every right which is afforded to them under the Constitution of both Kentucky and the United States. Since the Due Process Clause and Equal Protection Clause are such vested inherent rights within the Constitution, it can clearly be shown that this case does not conform or is substantial enough in which to merit Supreme Court review. This case was merely tried by deposition in which the trial court judged the credibility of the witnesses and made his decision.

As can be seen by the record as a whole, the Federal question was never ruled upon by any State Court. By examining the Complaint, Responses, Answers, Brief within the Trial Court, Briefs within the Court of Appeals and the Motion for Discretionary Review in the Supreme Court of Kentucky, it is clearly shown this question was never raised.

The first time that the Federal question was ever raised was within the jurisdictional statement filed with the Supreme Court of the United States. Clearly, under *Green Bay & Mississippi Canal Co. v. Patten Paper Company*, 172 U.S. 58, 19 S.Ct. 97, 43 L. Ed. 364, *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L. Ed. 1095 and *Manhattan Life Insurance Company v. Cohen*, 234 U.S. 123, 34 S.Ct. 874, 58 L. Ed. 1245 and *Seaboard A. L. Railway v. Padgett*, 236 U.S. 668, 35 S.Ct. 481, 59 L. Ed. 777, this is not sufficient.

Clear and necessary intentions that a Federal question was raised and decided in the State Court is sufficient to give rise to United States Supreme Court jurisdiction, but it is not sufficient to show that such a question might have arisen and been applicable to the case. Clear and necessary intentment from inspection of the whole record that the question had been raised and decided in the matter prescribed for jurisdiction must be shown in order for the Supreme Court to have jurisdiction to review the case. *Neilson v. Lagow*, 13 L. Ed. 909.

It seems that the Appellants have failed to illustrate a substantial Federal question or to timely raise that question pursuant to 28 U.S.C. 1257. Failure to do so will allow this court to dismiss this appeal for want of jurisdiction. *Jacks v. Helena*, 115 U.S. 288, 6 S.Ct. 39, 29 L. Ed. 392.

The Supreme Court has no jurisdiction to review this case because it is not clearly shown any Decision of the State Court which considered either denying or granting the right which is conferred on by the Constitution or involved in a Federal question. The record must clearly

express or by necessary implication that a Federal question was actually decided by the State Court adversely to the Appellant or Petitioner in the United States Supreme Court. *Kansas Endowment Association v. Kansas,* 120 U.S. 103, 7 S.Ct. 499, 30 L. Ed. 593.

Neither the Trial Court nor the Court of Appeals of Kentucky nor the Supreme Court of Kentucky ever made any ruling which confers or even indicates that they decided whether or not this case had anything to do with the Fourteenth Amendment Due Process and Equal Protection Rights. This was never brought to the attention of any of the state courts, nor was it ruled upon. Therefore, jurisdiction is not conferred upon the Supreme Court of the United States.

The Appellants rely upon the following cases in which to establish jurisdiction of this Court, none of which allows jurisdiction to be maintained by the Supreme Court of the United States, in this case.

In *Seminole Fruit and Land Company v. Piles,* 13 F.2d 878, a boundary line dispute in which the issue was raised prior to the appeal being taken. This federal question of the right to due process was raised in the pleading.

Secondly, *Ervin v. Dowde,* 366 U.S. 717, 81 S.Ct. 1639, was a case which the issue of right to a fair trial and impartial jury and change of venue was raised prior to the appeal being taken to the Supreme Court. It was argued in front of the highest court of the State of Indiana.

Third, the Appellants rely upon *Abbott v. Tacoma Bank of Commerce,* 175 U.S. 409, 20 S.Ct. 153, 44 L. Ed. 217 which case involved Due Process rights. This case held a reputation was not property under the meaning of

the Fourteenth Amendment. The Court refused to hold reputation as a property right. However, it must be stated that the issue of the Due Process Clause was raised in a reply to the answer, and, therefore, does not allow jurisdiction in this matter.

Finally, the case of *People of the State of New York, Ex Rel. New York and Queens Gas Company v. McCall,* a New York case found in 245 U.S. 345, 38 S.Ct. 122, 62 L. Ed. 337 which the due process issue was raised within the State Court prior to ever being appealed to the United States Supreme Court. So, therefore, none of the Appellants' cases will confer jurisdiction in this matter with reference to a mere boundary line dispute or where the federal question was not timely raised.

Finally, this Appeal to the United States Supreme Court should be dismissed for reasons that the judgment rests on an adequate non-federal basis. Under Kentucky law, a boundary line dispute in Eastern Kentucky is probably one of the most complicated issues to be decided by a trial court. As can be seen by the large record, this case involved a trier of fact who must decide on the credibility of the witnesses as well as to the legal questions and construction of deeds. Since these deeds are recorded in the Leslie County Court Clerk's Office some thirty-five years ago, it should be noted for the Supreme Court's convenience that the deeds were not photostatically copied or xeroxed in any way but were simply typed from the original deed onto the deeds book by the Clerk. Throughout the deed books in Leslie County during the period, certain recording errors were made.

The Judge looked at the original deeds as well as the recorded deeds and the deeds which are referred to back

in the chain of title. The reviewing courts were bound by Kentucky Civil Rule 52.01 which limits their right to disturb Findings of Fact and Conclusions of Law of the Trial Court unless they are clearly erroneous.

This rule simply states that unless there is a manifest abuse of discretion or there is not substantial evidence within the record to support the findings, then the finding of the Trial Court cannot be disturbed. It is clear from the record as a whole that the trial judge was impressed with the surveyor, Walter Scott Hoskins due to his preparation of maps and the means in which he used in surveying. The Court specifically stated in his findings of fact that the Appellant's witnesses were not as credible as the Appellees in that they all admitted to testifying as to what Willie Fields had illustrated to them. Therefore, the Appellees pray that this decision rest upon fundamental boundary line laws and the Kentucky Rules of Civil Procedure applied in this case and did not affect the Fourteenth amendment of Due Process Clause of the United States.

The Appellants major contention is found in the case of *Hensley v. Lewis,* a Court of Appeals case found in 128 S.W. 2d 917. The Appellants erroneously state that the location established by the grantor must control. The law in Kentucky states where a description contained in a deed is ambiguous, the rule for determining what property is being conveyed is that the intention of the parties shall generally control. Where parties have by their acts given a practical construction thereto, the intention of those parties will control. Therefore, the court must look to the intentions of the parties and in this case the common grantor, namely, Clara Lewis, who admitted she did not remem-

ber the boundary lines or the deeds of record, the Court must judge her credibility and gather the intentions of the parties from the surveyors, the deeds taken as a whole and by the evidence of reputation and tradition and the persons who actually knew the boundary lines. All credible evidence shall be heard and the finder of fact shall conclude where the boundary line is found. *Rowe v. Blackburn,* 253 S.W. 2d 25, *Hale v. Hanes,* 227 S.W. 2d 918, 312 KY 357, *Hensley v. Lewis,* 128 S.W. 2d 917.

Therefore, in establishing the boundary lines, all credible evidence is used to ascertain the boundaries of the adjacent tracts.

Several cases in this court, which involved real property, have stated that this is a matter of state law, not a Federal question. *Corporate Oil and Development Company v. Arnaudet,* LA, 1905, 199 U.S. 182, 25 S.Ct. 41, 50 L. Ed. 143, *Kramer v. Wilson,* 195 U.S. 408, 25 S.Ct. 94, 49 L. Ed. 256, *Donahue v. Vosper,* 243 U.S. 59, 37 S.Ct. 350, 61 L. Ed. 592.

The Supreme Court should dismiss the Appeal of the Appellants herein for reason that there is no standing of these Appellants to bring the Appeal. This is for the reason that on the 23rd day of January, 1985, Willie Fields and wife Mary Lee Fields did convey all their right, title and interest by Deed to Randy Fields for the boundary in dispute. Therefore, there is no controversy existing as between Willie Fields and Mary Fields and the Appellee, Berry Lewis.

Where the cause of action between the parties has ceased to exist, a writ of error must be dismissed, or in this case an appeal must be dismissed. *California v. San*

Pablo and T.R. Company, 149 U.S. 308, 13 S.Ct. 876, 37 L. Ed. 747. *United States v. Chetimachas Indians,* 131 U.S. 1 XX Appendix, 76, L. Ed. 1343 and *San Mateo County v. Southern PR Company,* 116 U.S. 138, 6 S.Ct. 317, 29 L. Ed. 589. Where there is no actual controversy involving real and substantial rights between the parties to the record, the case will be dismissed. *Little v. Bowers,* 134 U.S. 547, 10 S.Ct. 620, 33 L. Ed. 1016.

The Federal Supreme Court does not sit to give an opinion on moot questions or abstract propositions, or to declare principals or rules of law which cannot effect the matter and issue in the case before it, so that when, pending an appeal from the judgment of a lower court, and without any fault of the Defendant, an event occurs which renders it impossible for the Court to grant the Plaintiff any effectual relief if it should decide the case in his favor, it will not proceed to a formal judgment, but will dismiss the appeal. *Tennessee Ex Rel. Maloney v. Condon,* 189 U.S. 64, 23 S.Ct. 579, 47 L. Ed. 709. *Southern Pacific Terminal Company v. Interstate Commerce Commission,* 219 U.S. 498, 31 S.Ct. 279, 55 L. Ed. 310.

The Appellants argue they are the owners of the property but have conveyed by warranty deed the property in dispute. For that reason, there exists no controversy and the appeal must be dismissed.

In *Myer v. Pritchard,* 131 U.S. CCIX Appendix and 23 L. Ed. 961 an Appeal was taken by the Appellants, who surrendered the patent upon which the suit was brought and obtained a reissue patent. The Appeal was dismissed stating that the foundation of their legal rights had been surrendered, and, therefore, the Court could not affect their rights even if they found for the Appellants.

This is exactly the case at bar since Willie and Mary Lee Fields have conveyed their property to Randy Fields by deed. A copy of the deed is in the Appendix for the Court's convenience.

WHEREFORE, the Appellees pray that this Honorable Court dismiss the appeal of the Appellants to the United States Supreme Court for want of jurisdictions for the reasons that there was no substantial federal question present, that question was not adequately and timely raised within the state courts, the courts in the State of Kentucky did not consider that question or decide upon the alleged federal question, and finally, this decision rests upon other non-federal basis, and there is no existing controversy.

In the alternative, should the Supreme Court decide that there is jurisdiction, the Appellees would move to affirm the decision of the Kentucky Court of Appeals, Supreme Court and Leslie Circuit Court for the reasons that this question is so insignificant and that the grounds that it rests on within the State Court are so manifest that they need no further argument. The Appellants contend that their Fourteenth Amendment rights of Due Process and equal protection have been denied. However, they were given full opportunity to try the case, to cross examine witnesses, to call any and all witnesses that they desire to ask almost any question that they desire to ask in this situation. They even called Frank Bowling, a surveyor, in rebuttal to illustrate that certain markings upon trees were not surveyor markings. They have failed to illustrate that there is any manifest abuse of discretion so that an actual taking of property has occurred under the Due Process Clause. The Trial Court here simply made a decision regarding conflicting evidence in which

there was a surveyor, an engineer which testified for each side and much lay testimony was taken including the person who actually marked the boundaries, being Dewey Lewis. The Trial Court made the decision upon the credibility of the witnesses and the Court of Appeals and Supreme Court refused to overturn that decision pursuant to Kentucky Rules of Civil Procedure 52.01.

WHEREFORE, the Appellees pray that the Supreme Court, in the alternative, should affirm the Decision of the Supreme Court of Kentucky, the Court of Appeals of Kentucky and the Leslie County Circuit Court.

Respectfully submitted,

LEONARD H. BRASHEAR
Hyden Citizens Bank Building
P.O. Box 677
Hyden, KY 41749-0677
(606) 672-3577
Attorney for Appellees

APPENDIX

FAMILY DEED OF CONVEYANCE

This indenture made and entered into this the 23rd day of January, 1985, by and between WILLIE FIELDS & MARY LEE FIELDS, his wife, parties of the first part, and RANDY FIELDS, 1568 Eastwood Court, Lexington, Kentucky 40505, party of the second part.

WITNESSETH: That for and in consideration of love and affection that parties of the first part have for party of second part, first parties being the parents of second party, and no other consideration, the receipt of which is hereby acknowledged, parties of the first part do hereby grant, sell and convey unto the party of the second part, his heirs and assigns, the following described property, to-wit:

TRACT I: A certain tract or parcel of land, lying in Leslie County, Kentucky, on Greasy Fork of the Middle Fork of the Kentucky River and bounded as follows:

BEGINNING on a basket oak corner of E.M. Lewis and Robert Lewis running northwardly with Berry Lewis line to a cedar marked with three ax marks; thence running westwardly 8 feet and 8 inches to Clary Lewis's fence; thence running with Clary Lewis's fence to a cedar marked with three ax marks in corner of yard above the road; thence a straight line crossing road to E.M. Lewis line; thence with same to the beginning, containing ½ acre, more or less.

BEING the same property conveyed to Willie Fields and Mary Lee Fields by deed dated October 21, 1980 of record in Deed Book 93, page 218, Leslie County Court Clerk's Office.

TRACT II: Lying and being in Leslie County, Kentucky, on Lick Branch, waters of Greasy Creek and Greasy Creek and being more fully described in a deed of conveyance dated November 17, 1947, and recorded in Deed Book 49, pages 286-287, records Leslie County Court Clerk's Office, References made to said deed for a more definite description of the land herein conveyed.

EXCEPTIONS

It is understood that the prior grantor, Clara Fee Lewis has heretofor conveyed to Mabel C. Snyder a parcel of the above described tract and same is excepted from this conveyance. Said deed is dated December 20, 1947, and recorded in Deed Book 40, page 429 records Leslie County Court Clerk's Office, to which reference is here made for a description of said boundary exception.

There is also excepted from the above conveyance a tract of land conveyed by Clara Lewis to Berry Lewis by deed dated February 18, 1950 and recorded in Deed Book 51 at page 456, Leslie County Court Clerk's Office. Reference is made for said deed for a description of the parcel exception.

Also there is excepted from the boundary conveyed and other tract conveyed by Clara Lewis to Estil Coots, by deed dated February 15, 1952, and recorded in Deed Book 53, page 425, records Leslie County Clerk's Office. References made to this deed for a description of the exception in this conveyance.

BEING the same property conveyed to Willie Fields and Mary Lee Fields by deed dated April 22, 1957 of record in Deed Book 81, page 32, Leslie County Court Clerk's Office.

TO HAVE AND TO HOLD the same together with all appurtenances thereunto belonging unto the party of the

second part, his heirs and assigns forever, with COVENANT OF GENERAL WARRANTY.

Given under our hands that 23rd day of January, 1985.

/s/ Willie Fields
/s/ Mary Lee Fields

COMMONWEALTH OF KENTUCKY
COUNTY OF RUSSELL

I, Debra E. Johnson, Notary Public, do certify that the foregoing Deed from Willie Fields and Mary Lee Fields, his wife, to Randy Fields was this day produced to me in the County and State aforesaid by Willie Fields and Mary Lee Fields and acknowledged by them to be their free act and deed.

Given under my hand this the 23rd day of January, 1985.

/s/ Debra E. Johnson
NOTARY PUBLIC
MY COMMISSION EXPIRES
7-13-88

PREPARED BY:

/s/ M. Gail Wilson
BERTRAM & WILSON
Attorneys at Law
One Monument Square
Jamestown, Kentucky, 42629

STATE OF KENTUCKY)
) Sct.
COUNTY OF LESLIE)

I, Earl Fields, Clerk of the County and State aforesaid, do hereby certify that the foregoing Deed was, on the 7th day of February 1985, lodged in my office for record,

and that it, the foregoing and this certificate, have been duly recorded in my said office in Deed Book No. 102 Page 649.

Witness my hand this 7th day of February 1985.

Earl Fields Clerk

By /s/ Dianne Hoskins D.C.